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NO. 71-1699

IN THE

SUPREME COURT OF THE UNITED STATES

GENE GODWIN,

Appellant

v.

MARTIN DIES,

Appellee

MOTION OF APPELLEE TO DISMISS APPEAL OR AFFIRM PURSUANT TO SUREME COURT RULE 16

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellee Martin Dies, hereby respectfully moves this Court, pursuant to Rule 16, United States Supreme Court Rules, for an order dismissing the within appeal or, in the alternative, affirming summarily the Judgment of the United States District Court, Northern District of Texas, Amarillo Division, entered August 27, 1971.

COUNTERSTATEMENT OF THE CASE

Gene Godwin filed a petition in the United States District Court, Northern District of Texas, Amarillo Division, seeking to revoke and declare void Article 13.50, Election Code of the State of Texas, and requested that a three-judge court be convened. No injunctive relief was requested.

The Honorable Leo Brewster, of the District Court, denied Appellant's request for a three-judge court and granted the motion to dismiss filed by Appellee herein. A portion of the Court's opinion, as applicable to this case, is attached to Appellant's Petition for Writ of Certiorari, Appendix H, pages 36-39.

Appellant attempted an appeal to the United States Court of Appeals for the Fifth Circuit, however, failed in such attempt as shown by Appendix A, B, E, and F, attached to Appellant's Petition for Writ of Certiorari. His appeal was dismissed for failure to comply with the liberal time limits granted by the Fifth Circuit Court of Civil Appeals. Appendix B and F to Appellant's Petition.

NO SUBSTANTIAL FEDERAL QUESTION PRESENTED

Texas Election Code, concerning independent candidates, Article 13.50, V.A.T.S., reads in its pertinent part, as follows:

> "If for an office to be voted for throughout the state, the application shall be signed by one per cent of the entire vote of the state cast for Governor at the last preceding general election, and shall be addressed to the Secretary of State.
>
> ". . .
>
> "Any person signing the application of an independent candidate may withdraw and annul his signature by delivering to the candidate and to the officer with whom the application is filed (or is to be filed, if not then filed), his written request, signed and duly acknowledged by him, that his signature be cancelled and annulled. The request must be delivered before the application is acted on, and not later than the day preceding the last day for filing the application. Upon such with-

drawal, the person shall be free to sign the application of another candidate for the same office."

Texas law allows a person to be a candidate for election as a representative of a political party, Article 13.01 and 13.01a; as an independent candidate, Article 13.50; and as a write-in candidate, Article 6.06, Election Code, V.A.T.S.

Appellee submits that the case of *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554, controls the basic issue herein and the distinction between the subject case and *William v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24.

In the *Jenness* case, the law governing independent candidates for the State of Georgia was contested on the basis of an independent candidate needing a nominating petition signed by not less than 5% of those eligible to vote at the last election for the office sought by the independent. Texas, by contrast, requires only 1% of the vote cast for governor in the last preceding general election.

Mr. Justice Stewart, in the *Jenness* case, stated:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a potential organization and its candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."

Such compelling State interest exists in the subject case.

Article 13.50 of the Texas Election Code also allows freedom to the person signing a nominating petition to withdraw his name by giving notice to the candidate. This recognizes the right of the voter to change his

mind, which is a part of the political process, and lend his support to another candidate.

The case *Jackson v. Ogilvie*, 325 F.Sup. 864 affirmed 403 U.S. 925, 91 S.Ct. 2247, 29 L.Ed.2d 705, also decided that an Illinois statute requiring independent candidates to obtain 5% of total vote cast in last election, serve a compelling state interest and was not unconstitutional.

Appellant's brief discusses many varied questions, however, only the above were plead and presented to the trial court and are properly reviewable herein.

Further, the United States Court of Appeals for the Fifth Circuit gave ample opportunity, by liberal extension of time, to Appellant to perfect and present his appeal. When faced with Appellant's failure to pursue the appeal, the Court of Appeals properly dismissed Appellant's action.

CONCLUSION

Appellee prays that Appellant's appeal be dismissed, or, alternatively, the judgment of the United States District Court, for the Northern District of Texas, Amarillo Division, and the Order of Dismissal issued by the United States Court of Appeals for the Fifth Circuit be affirmed.

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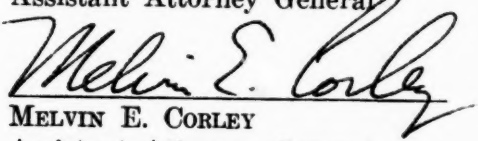

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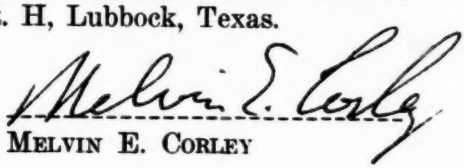
CERTIFICATE OF SERVICE

I, Melvin E. Corley, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing Motion of Appellee to Dismiss Appeal or Affirm Pursuant to Supreme Court Rule 16 has been forwarded by United States Mail, First Class, postage pre-paid to Appellant Gene Godwin, 1706 - 26th Street, Apt. H, Lubbock, Texas.



MELVIN E. CORLEY